Supreme Court of the United States

OCTOBER TERM, 1945.

No. _____.

MRS. C. D. PIERCE, TRUSTEE OF THE ESTATE OF J. A. KUNKEL, BANKRUPT, PETITIONER,

VS.

J. A. KUNKEL, B. F. EDWARDS, J. K. FORD, JR., C. M. KENNEDY, LIBERTY NATIONAL BANK IN PARIS, TEXAS, AND RED RIVER NATIONAL BANK IN CLARKSVILLE, TEXAS, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is reported in 151 F. 2d 897, and appears in this record on page 148.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit, here sought to be reviewed, was entered December 7, 1945 (R. p. 146). Application for rehearing was filed December 17, 1945 (R. p. 151), and was denied December 28, 1945 (R. p. 160).

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347, 43 Stat. 938); Rule 38, Sup. Ct. U. S.

STATEMENT.

The principal facts are set forth in the summary statement in the petition *supra*, pp. 2-11.

SPECIFICATIONS OF ERROR.

It is submitted that the United States Circuit Court of Appeals for the Fifth Circuit erred:

1. In holding that the debt which arose prior to bankruptcy out of advancements of money by the bankrupt to Red River County, and which was after bankruptcy recognized as a valid debt by the State Legislature and the Commissioners' Court, and paid as such, did not pass to and vest in the Trustee in Bankruptcy as a part of the bankrupt's estate under the provisions of Section 70 (a) of the National Bankruptcy Act.

2. In holding "That the debt WAS CREATED by the Special Act of the Legislature."

3. In holding that the Act of the Legislature and the orders and resolutions of the Commissioners' Court

do not constitute a complete bar to the defense offered by the bankrupt and his assignees that the money paid to them is a mere gift, gratuity or reward, and not in payment of a pre-existing debt.

4. In holding that although the bankrupt and his assignees received the interest bearing county warrants under a written stipulation reading "That said warrants shall be delivered to and accepted by said John A. (J. A.) Kunkel, his heirs or assigns in full settlement of the indebtedness due them by Red River County, Texas," that the bankrupt and his assignees were not thereby estopped to deny that the money so received was in full settlement of the indebtedness due them by Red River County, Texas.

5. In affirming the judgment of the trial court, there being no competent admissible evidence of this record to support the judgment of the trial court.

ARGUMENT.

1.

The Circuit Court erred in holding that the debt which arose prior to bankruptcy out of advancements of money by the bankrupt to Red River County, and which was after bankruptcy recognized as a valid debt by the State Legislature and the Commissioners' Court, and paid as such, did not pass to and vest in the Trustee in Bankruptcy as a part of the bankrupt's estate under the provisions of Section 70 (a) of the National Bankruptcy Act.

Section 70 (a) of the National Bankruptcy Act provides:

> (a) "The Trustee of the estate of a bankrupt, and his successor or successors, if any, upon his or their appointment, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy * * *, to all—
>
> (5) "Property, including rights of action, which prior to the petition he could by any means have transferred * * *.
>
> (6) "Rights of action arising upon contract * * *."

If the bankrupt had any such rights at the time of the filing of his petition, such rights passed to and vested in the Trustee, and the Trustee is accordingly entitled to recover. *Williams* v. *Heard et al.*, 140 U. S. 529, 11 S. Ct. 884; *Milnor* v. *Metz*, 16 Pet. 221; *Erwin* v. *United States*, 97 U. S. 392; *Comegys* v. *Vasse*, 1 Pet. 193; *Clark* v. *Clark*, 17 How. 315, 15 L. Ed. 77; *Phelps* v. *McDonald*, 99 U. S. 298, 25 L. Ed. 473.

This is true even though the claim at the time of the intervention of bankruptcy was barred by the Statute of Limitations, it having been so held by this court in the case of *Erwin* v. *U. S.*, 97 U. S. 392, from which we quote:

> "The demand of a bankrupt which is outlawed, must go to the assignee, for contingencies may arise in many ways which will give value to it. Demands against the government which would be valid between individuals, such as services rendered, goods taken, are property, although there is no court to investigate and pass on their validity and their recognition and payment may depend upon the caprice of the legislature."

This court held in *Williams* v. *Heard et al.*, 140 U. S. 529, 11 S. Ct. 884, that:

> "* * * nevertheless, there was at all times a MORAL OBLIGATION on the part of the government to do justice to those who had suffered in property. * * * There was thus at all times A POSSIBILITY that the government would see that they were paid. There was a possibility of their being at some time valuable. They were rights growing out of property; rights, it is true, that were not enforceable until after the passage of the act of congress for the distribution of the fund. But the act of congress did not create the rights. THEY HAD EXISTED AT ALL TIMES SINCE THE LOSSES OCCURRED. THEY WERE CREATED BY REASON OF LOSSES HAVING BEEN SUFFERED. * * * IT IS ENOUGH THAT THE RIGHT EXISTS WHEN THE TRANSFER IS MADE, NO MATTER HOW REMOTE OR UNCERTAIN THE TIME OF PAYMENT. The latter does not affect the former. * * * Vested rights *ad rem* and *in re*—possibilities coupled with an interest on claims growing out of property—pass to the assignee."

This court further held in *Erwin* v. *United States*, 97 U. S. 392, that:

"Upon the first point, the argument of the appellant is substantially this: That the claim, at the time the petition in bankruptcy was filed, did not constitute an enforceable demand against the government, and was not, therefore, in its nature assignable property; and that if the claim constituted a demand against the government in the nature of property, it was incapable of assignment * * * This argument is unsound. When the appellant filed his petition in bankruptcy, his claim against the government WAS PROPERTY, though of uncertain value."

This court held in *Comegys* v. *Vasse*, 1 Pet. 193, 7 L. Ed. 108, that:

"Claims and debts due from a sovereign are not ordinarily capable of being so enforced. Neither the king of Great Britain, nor the government of the United States, is suable in the ordinary courts of justice, for debts due by either. Yet, who will doubt that such debts are rights? * * * If he possessed claims by abandonment, to the amount of $100,000, WHICH MIGHT, BY FUTURE EVENTS, BE RENDERED MORE OR LESS PRODUCTIVE, AND WHICH MIGHT BE (AS THEY HAVE OFTEN BEEN) SALABLE AND TRANSFERABLE IN THE MARKET; SUCH FUNDS, PRESENT OR EXPECTANT, MIGHT WELL BE DEEMED WITHIN THE LEGISLATIVE POLICY, AND FIT TO PASS TO THE CREDITORS BY ASSIGNMENT. IT MIGHT OTHERWISE HAPPEN THAT LARGE RECOVERIES MIGHT ULTIMATELY VEST IN THE BANKRUPT, FOR HIS OWN EXCLUSIVE BENEFIT, UPON RIGHTS PRE-EXISTENT, AND VESTED AT THE TIME OF HIS BANKRUPTCY."

This court held in *Phelps* v. *McDonald*, 99 U. S. 298, that:

"Nor is it material that the claim cannot be enforced by a suit under municipal law which author-

> izes such a proceeding. In most instances the payment of the simplest debt of the sovereign depends wholly upon his will and pleasure. The theory of the rule is that the government is always ready and willing to pay promptly whatever is due to the creditor. * * * It is enough that the right exists when the transfer is made, no matter how remote or uncertain the time of payment. The latter does not affect the former. Nor has an adverse decision any final effect. * * * If the thing be assigned, the right to collect the proceeds adheres to it, and travels with it whithersoever the property may go. They are inseparable. Vested rights *ad rem* and *in re*—possibilities coupled with an interest and claims growing out of property —pass to the assignee. * * * In the light of these considerations, it would be sheer fatuity to deny the substantial character and value of the claim at the time of the transfer by the register's deed."

The Circuit Court seems to have concluded that no debt was created by the advancements because "no writing was entered into between Red River County and Kunkel" (R. p. 147), "nor was any tax levied or other provision made which might evidence the existence of a debt" (R. p. 147).

However, it must be conceded that under the facts found by the Texas Legislature, if these transactions had been between private individuals, and IMPLIED OBLIGATION would have arisen which would be enforceable in an action at law.

The rule in Texas as stated by the Supreme Court in *H. G. Seeligson* v. *Lewis & Williams,* 65 Tex. 215, is—

> "The law implies a promise to pay when one person, at the request of another, discharges for him to a third person a legal obligation."

The foregoing rule has been consistently followed in Texas as reflected in the following cases: *M. C. Lee &*

Company v. *Stowe and Wilmerding,* 57 Tex. 444; *Ware* v. *Galveston R. & S. Railway Company,* 2 Wilson Civ. Cas. Ct. App. 740; *Farmers' National Bank of Cooper* v. *Allard,* 262 S. W. 793; *The American Exchange National Bank of Dallas* v. *Keeley,* 39 S. W. 2d 929; and *First National Bank in Dallas* v. *Keeley,* 61 S. W. 2d 1037.

The question of whether or not an IMPLIED CONTRACT may be enforced against a county when it received money, property or services under a contract which the fundamental law has made void, has been discussed and decided in favor of the recovery by the Supreme Court of Texas, in the cases of: *Austin Bros.* v. *Montague County et al.,* 10 S. W. 2d 718; *Sluder* v. *City of San Antonio,* 2 S. W. 2d 841; and *City of Houston* v. *Finn,* 161 S. W. 2d 776.

The Circuit Court in holding that the county could not be bound by an implied contract is therefore in conflict with the established law of Texas.

In the case of *Sluder* v. *City of San Antonio, supra,* the court said:

> "* * * our courts hold that common honesty and fair dealing require that a county or municipality should not be permitted to receive the benefit of MONEY, property, or services, without paying just compensation therefor. Under such circumstances, a private corporation would clearly be liable under an IMPLIED CONTRACT. There can be no sound reason why the same obligation to do justice should not rest upon a municipal corporation."

The Supreme Court in the *City of Houston* v. *Finn,* 161 S. W. 2d 776, said:

> "The contract that is enforced is one that the law implies because justice demands that a municipality shall not be permitted to receive and retain the

benefits of an agreement without paying the reasonable value of such benefits."

This court said in *Erwin* v. *U. S.*, 97 U. S. 392:

> "Demands against the government, if based upon considerations which would be valid between individuals, such as services rendered or goods taken, are property, although there be no court to investigate and pass upon their validity, and their recognition and payment may depend upon the caprice or favor of the Legislature."

The Trustee urges that the Circuit Court erred in failing to declare that the funds derived from the Interest Bearing County Warrants were an asset of the bankrupt's estate and passed to and vested in the Trustee.

Besides, it was for the Texas Legislature to determine whether or not the facts and circumstances under which the advancement was made created a valid and legal county obligation, and having determined the question, it was not thereafter subject to judicial investigation and review.

2.

The Circuit Court erred in holding "That the debt WAS CREATED by the Special Act of the Legislature."

The Circuit Court has failed to distinguish between the RIGHT and the remedy.

Whatever RIGHT the bankrupt had, arose out of *and at the time* of the advancement of money to the county. The remedy was a creature of the statute.

As said by this court in *Williams* v. *Heard et al., supra,* 140 U. S. 529, 11 S. Ct. 885, 35 L. Ed. 550:

> "But Congress DID NOT CREATE the rights. They had existed at all times since the losses occurred. They were created by reason of the losses

having been suffered. It is enough that the right exists when the transfer is made, no matter how remote or uncertain the time of payment."

It was held in *State* v. *Haldeman*, 163 S. W. 1020, that if no valid claim existed prior to the passage of the Act, none existed afterwards, for the Legislature could not create a debt and authorize its payment.

The statement "That the debt WAS CREATED by the Special Act of the Legislature" is a self-contradicting and erroneous statement of law—a debt being an obligation or demand arising out of a contract, either express or implied, and the Circuit Court having declared that no contract, express or implied, arose out of the advancement of money by the bankrupt to the county.

To say that the Special Act created the debt is merely another way of saying that the Legislature made a gift to the bankrupt out of the County and Road District Highway Funds, which it could not do without violating the Texas Constitution as construed by the Supreme Court of the State in *Jefferson County* v. *Board of County and District Road Indebtedness*, 182 S. W. 2d 908.

3.

The Circuit Court erred in holding that the Act of the Legislature and the orders and resolutions of the Commissioners' Court do not constitute a complete bar to the defense offered by the bankrupt and his assignees that the money paid to them is a mere gift, gratuity or reward, and not in payment of a pre-existing debt.

In relation to the conclusive effect of the Acts of the Legislature in identifying the character of the funds received by the respondents, the Trustee refers as authority to the decision of this court in *U. S.* v. *Carolene Products*

Company, 304 U. S. 144, 58 S. Ct. 778, in which it was held that:

> "As that decision was for Congress, neither the findings of a court arrived at by weighing the evidence, nor the verdict of a jury, can be substituted for it."

and the decision of this court in *Chesebro* v. *Los Angeles County Food Control District et al.,* 306 U. S. 459, 59 S. Ct. 622, in which it was held that:

> "And where, within the scope of its powers, the Legislature itself has found that the lands included in the district will be specially benefited by the improvements, prior appropriate and adequate inquiry is presumed, and the finding is conclusive."

and the decision of this court in *Clark Directory of Motor Vehicles et al.* v. *Paul Gray,* 306 U. S. 583, 59 S. Ct. 744, in which it was held that:

> "The determination of the Legislature is presumed to be supported by facts unless facts judicially known or proven preclude that possibility (Citing cases); hence in passing on the validity of the present classification, it is not the province of a court to hear and examine evidence for the purpose of deciding again a question which the Legislature has already decided. Its function is only to determine whether it is possible to say that the Legislative decision is without rational basis."

The foregoing opinions are made all the more applicable in this case because the bankrupt and his assignees were the movents in the procurement of the passage of the act and admittedly assisted in the actual preparation of the bill itself (Testimony of Respondent Kennedy R. p. 53).

In relation to the conclusive effect of the orders and resolutions of the Commissioners' Court:

The Commissioners' Court is a constitutional court of exclusive jurisdiction to pass upon claims against the county. It was held by the Texas Supreme Court in *Yoakum County et al.* v. *Gaines County,* 163 S. W. 2d 393; *Tarrant County* v. *Shannon et ux.,* 101 S. W. 2d 4; and *McWilliams et al.* v. *Commissioners' Court of Pecos County et al.,* 153 S. W. 368, that the judgments of the Commissioners' Court are not reviewable and are conclusive over all matters over which they have been given jurisdiction by the constitution, and the facts determined by such court as a basis for its action may not thereafter be re-examined in any collateral matter. The foregoing rule is reinforced here by the fact that the respondents themselves procured these orders.

The Trustee urges in addition to the above, the doctrine of judicial estoppel as pronounced by this honorable court in the case of *State of Oklahoma* v. *State of Texas, defendant, United States of America, intervenor,* 256 U. S. 70, 65 L. Ed. 831, and in the case of *Cromwell* v. *County of Sac,* 94 U. S. 351, 352, 24 L. Ed. 195, in which the rule was declared to be that:

> "A question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery or defense in a suit or action between parties *sui juris* is conclusively settled by the final judgment or decree therein."

If the foregoing rule is not broad enough to be applied to the adjudication of this claim by the Commissioners' Court procured by the respondents to their own benefit, then we respectfully urge that this court should broaden the doctrine sufficiently to make it apply.

This action by the Trustee is governed by the rules of equity practice, and we deem it wholly inequitable for these respondents to obtain the passage of this Special Act and to obtain the orders and resolutions of the Commissioners' Court for their own benefit, and then be permitted to deny the conclusive effect of the action of these tribunals.

4.

The Circuit Court erred in holding that although the bankrupt and his assignees received the interest bearing county warrants under a written stipulation reading "That said warrants shall be delivered to and accepted by said John A. (J. A.) Kunkel, his heirs or assigns in full settlement of the indebtedness due them by Red River County, Texas," that the bankrupt and his assignees were not thereby estopped to deny that the money so received was in full settlement of the indebtedness due them by Red River County, Texas.

It would seem wholly inequitable to permit the bankrupt to acquire these funds upon the claim that the county owed him the money, and then to permit him to retain the funds on the claim the county did not owe him the money.

5.

The Circuit Court erred in affirming the judgment of the trial court, there being no competent admissible evidence of this record to support the judgment of the trial court.

The decision of the Circuit Court is based almost exclusively upon the parol testimony of the bankrupt, admitted over the objection of the Trustee (R. p. 113).

The lower court held that this testimony was admissible because "The record fails to show any statement made by Kunkel or his attorneys from which the Trustee of his bankruptcy estate can successfully assert that they are estopped from denying that a contract was made when the money here in question was advanced" (R. p. 149), and that "it is almost too elementary to state that an issue must have been decided before it can come within the scope of *res judicata.*"

The bankrupt and his assignees admittedly labored "two or three or four months" before the Legislature in their successful effort in getting that tribunal to decide that the advancements of money made by the bankrupt to the county prior to bankruptcy created a valid and legal indebtedness of the county due the bankrupt.

This is freely admitted by the bankrupt in his testimony in response to questions propounded by his own attorney. The question was asked, "Will you tell me how long you worked on it at Austin, before you got the bill through the Legislature?" The bankrupt answered, "At Austin, I worked two or three or four months, I would say. It seems like that was all" (R. p. 119).

The bankrupt's attorney, C. M. Kennedy, testified, "I assisted in the preparation of the necessary legislation to effectuate the payment, and I appeared before the necessary committees of the Legislature to see that it was moved along in proper intervals" (R. p. 53).

What representations were made to the Legislature by these respondents are reflected in the Special Act itself wherein the Legislature found the facts (R. p. 68) from which it concluded that:

> "It is the purpose and intent of this Act to declare the indebtedness THUS CREATED by the County of

> Red River to be such an evidence of indebtedness as comes within the terms of Acts, 1932" (R. p. 69).

and further declared the legislative purpose to be that:

> "The sum so determined * * * is hereby declared to be a valid indebtedness of Red River County" (R. p. 69).

Thus, it affirmatively appears in this record that the respondents did appear before the Legislature, that they did present the facts for decision by that tribunal, that the Legislature did decide what the facts were from the representations of these respondents, and concluded that these facts created a valid indebtedness of Red River County.

The Circuit Court further held that "Kunkel claimed no indebtedness from Red River County" (R. p. 149). Yet the bankrupt, through his attorney, C. M. Kennedy, stated from the witness stand that:

> "* * * and then after the Legislature passed this bill, I made several trips back to Red River County in connection with the presentation of the claim to the county" (R. p. 53).

In prosecuting this claim before the Commissioners' Court, the bankrupt and his assignees procured from that court the following findings of fact:

> "Whereas, this court now finds and determines that the sum of $18,499.96 is the amount of indebtedness due the said John A. (J. A.) Kunkel, his heirs and assigns, under the terms of said House Bill No. 725, and this court finds that said sum nor any part thereof has been repaid to the said John A. (J. A.) Kunkel, his heirs or assigns" (R. p. 75).

The Commissioners' Court had previously adopted the entire fact findings of the Special Act of the Legislature as a

part of its judgment (R. pp. 66-70). Thus, it affirmatively appears in this record that the respondents submitted the facts to the Commissioners' Court for a decision upon the issue of whether or not the antecedent facts created a legal and valid indebtedness of the county, and were successful in obtaining an adjudication of that issue, by a court of competent jurisdiction.

Yet the Circuit Court states: "It is almost too elementary to state that an issue must have been decided before it can come within the scope of *res judicata*."

The Trustee does not assume that the State Legislature and the Commissioners' Court upon their own initiative, and without the presentation of these facts by the bankrupt, voluntarily made an unsolicited gift of this money to the bankrupt.

The Trustee cannot reasonably assume that these decisions made by the State Legislature and by the Commissioners' Court were made without the facts being presented to these tribunals by the bankrupt for decision.

The State Legislature and the Commissioners' Court, acting upon the facts presented to them by the respondents, having decided this issue, the Trustee urges that that decision is conclusive upon the issue and it could not properly be relitigated in the Federal Court.

As said by this court in *State of Oklahoma* v. *State of Texas, defendant, United States of America, intervenor,* 256 U. S. 70, 65 L. Ed. 831:

> "The matter being *res judicata* as a result of a decree in a former suit, it is of no consequence whether it was correctly decided or not."

The plain and simple truth is that the respondents procured this money on the sole and only theory that Red River County did owe the bankrupt a debt which ex-

isted at the time of the intervention of bankruptcy, and having so collected the money, they should not be heard to say in this suit that the State merely made a gift of the money to them in violation of the State Constitution which expressly forbids such use of the County and Road District Highway Fund.

Respectfully the petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court for the Fifth Circuit, to the end that the errors complained of be corrected.

Respectfully submitted,

OTIS HAROLD WOODROW,
Sherman, Texas,
Attorney for Petitioner.

Otis Harold Woodrow